NO. 91-2019

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

THE STATE OF MINNESOTA,
Petitioner,

v.

TIMOTHY DICKERSON,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON THE MERITS IN SUPPORT OF RESPONDENT

DAVID M. ELDRIDGE
Ritchie, Fels & Dillard, P.C.
606 West Main Street
Post Office Box 1126
Knoxville, Tennessee 37901-1126
(615) 637-0661

For Amicus Curiae
National Association of Criminal
Defense Lawyers

55 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

QUESTIONS PRESENTED

I. IN VIEW OF THE FACTUAL RECORD BEFORE THIS COURT, WHETHER CERTIORARI WAS IMPROVIDENTLY GRANTED

II. WHETHER THE MINNESOTA SUPREME COURT PROPERLY CONCLUDED THAT OFFICER ROSE WAS NOT CONSTITUTIONALLY PERMITTED TO REACH INTO RESPONDENT'S POCKET TO SEIZE THE ITEM THEREIN

STATEMENT OF THE INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc., (NACDL) is a District of Columbia non-profit corporation with a nationwide membership of more than 5,000 lawyers and 25,000 affiliate members. NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of attorneys who represent criminally accused citizens.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL is concerned with the protection of individual rights and the

improvement of the criminal law, its practices and procedures.

A cornerstone of this organization's objectives, and of the criminal justice system, is the fundamental constitutional protection afforded all individuals against unreasonable invasions of their personal privacy by governmental agents. NACDL is very concerned about any decision that would undermine or dilute this constitutional guarantee, as would adoption of the position taken by the petitioner in the instant case.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues presented here are of such importance to the defense lawyers and citizens of this nation that the NACDL should offer its assistance to the Court. Both petitioner and respondent have consented to NACDL's participation as

amicus curiae pursuant to Rule 37.3 of the Rules of this Court, and letters of consent have been filed with this Court.

SUMMARY OF THE ARGUMENT

I. The factual record in this case presented to this Court by the opinion and judgment of the Minnesota Supreme Court does present the question the State of Minnesota asks this Court to answer. Accordingly, the petition for certiorari should be dismissed by this Court as improvidently granted.

The State of Minnesota has asked this Court to decide whether it should be hold that a "plain feel" exception to the fourth amendment warrant requirement exists when an officer develops p. ble cause to believe an individual possesses contraband or evidence of the crime "through the sense of touch during a lawful pat-down." (Petition at i). The manner in which this question is framed assumes that the factual findings presented to this Court are those of the Minnesota trial court.

However, the factual record presented to this Court are the fact-bound conclusions of the Minnesota Supreme Court to the effect that Officer Rose "set out to flaunt the limitations of *Terry* and he succeeded." 481 N.W.2d 840, 844 (Minn. 1992). The Minnesota Supreme Court further concluded that Officer Rose could not have immediately known that the lump in Mr. Dickerson's pocket was contraband because of the extensive manipulation of that item he undertook prior to making his determination that he would remove the item from the pocket. The Minnesota Supreme Court's fact-bound findings in this regard are entitled to deference by this Court.

Accordingly, the factual prerequisites to the presentation of the "plain feel" issue articulated by the State of Minnesota in its petition are not present on the record presented to this

Court. Therefore, the writ of certiorari should be dismissed as improvidently granted.

II. A. The decision of the Minnesota Supreme Court to suppress the contraband seized from Mr. Dickerson's pocket should be affirmed. The companion case to *Terry v. Ohio*, *Sibron v. New York*, 392 U.S. 40 (1968) remains the law of this Court. The facts of this case are constitutionally indistinguishable from those presented in *Sibron* and accordingly, *Sibron v. New York* controls the resolution of the questions presented in this case.

B. In the event that the Court concludes that *Sibron* is not controlling, a plain feel exception to the warrant requirement is not justified by the facts presented here and would constitute an unreasonable invasion of personal privacy that this Court should not sanction. *Terry*

v. Ohio authorized a brief and limited pat-down search of the outer clothing of an individual that is suspected of criminal conduct solely on the basis that it was necessary to protect the safety of police officers and passers by. Once the safety justification is removed, any further intrusion upon the privacy of the person's clothing is not justified.

Feeling or touching an individual's outer clothing is a significantly greater invasion of personal privacy than mere observation. Accordingly, the "plain feel" doctrine is far more than a mere corollary to the plain view doctrine. The feeling necessary to "recognize" an object is in itself a search requiring probable cause. This point significantly distinguishes feeling from observation by other senses. This point is further confirmed by the fact that Officer

Rose's action in this case is constitutionally indistinguishable from the action at issue in *Arizona v. Hicks*, 481 U.S. 321 (1987).

C. There is further no officer safety justification for the adoption of a plain feel exception to the warrant requirement of the Fourth Amendment.

D. Finally, in the event that this Court chooses to adopt a "plain feel" exception of the warrant requirement of the Fourth Amendment, the exception should be properly limited. A properly limited plain feel exception to the warrant requirement would require suppression of the contraband at issue in this case.

ARGUMENT

I. THE FACTS OF THIS CASE DO NOT PRESENT THE QUESTION THE STATE OF MINNESOTA ASKS THIS COURT TO ANSWER: THE PETITION FOR CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

A. The Officer's Testimony and Trial Court Findings

Officer Vernon D. Rose of the City of Minneapolis Police Department testified at the suppression hearing in this case in pertinent part as follows:

Q: Why did you stop that individual [Dickerson]?

A: **To check him for weapons and contraband.**

(T. 22) (emphasis supplied).

Q: Now what did you do after you made the stop?

A: **I pat-searched the party for weapons and contraband . . .**

Q: Describe how you conducted the search then.

A: I started down from the shoulders to the underarms. I then went across the waist band and I came back up to the chest and I hit a nylon

jacket that had a pocket and the nylon jacket was very fine nylon and as I pat-searched the front of his body **I felt a lump, a small lump, in the front pocket. I examined it with my fingers** and it slid and it felt to be a lump of crack cocaine in cellophane.

Q: Up to the point had you checked inside of any pockets?

A: No. Just patting the outside.

Q: Why did you think that it felt like crack?

A: Because I felt it before in clothing.

Q: What did you do then?

A: I removed the piece of crack cocaine.

Q: And it was in fact --

A Suspected crack cocaine, yes.

Q: Was it in a container of any sort or was it just laying loose in the pocket.

A: **It was in like a sandwich-wrapped material with a knot tied on it. You could feel the knot through the nylon also.**

Q: **How certain were you at that point that it was in fact crack cocaine before you took it out?**

A: **I was absolutely sure that's what it was, or I would have left it in there.**

Q: **Okay. Then the first thing you said to him was, "Put your hands on the hood of the car"?**

A: **Yes.**

Q: **And then you conducted a search?**

A: **Correct.**

(T. 19) (emphasis supplied).

In further describing Mr. Dickerson's jacket, Officer Rose stated that he did not notice any bulges in his pockets and that he remembered the jacket as being "kind of fluffy . . . ." (T. 20).

Based upon this testimony, the trial court found that Officer Rose conducted a pat-search of the defendant for **weapons** [not drugs] and during this pat-search he "felt a small, hard object wrapped in plastic in the defendant's pocket." (Trial Court Order) (Petition Appendix C-2)(emphasis supplied). The trial court further concluded that during this pat search for "weapons", Officer Rose felt the object that he promptly concluded was crack cocaine based upon its feel through Mr. Dickerson's jacket pocket. (Petition Appendix C-5).

Thus, the trial court found that the seizure of the contraband in this case occurred as a result of Officer Rose developing probable cause to believe that the contraband was in Mr. Dickerson's pocket through Officer Rose's sense of

touch during a lawful pat down search of Mr. Dickerson for weapons. Id.

However, this version of the factual circumstances under which the seizure occurred was rejected by the highest court of the State of Minnesota.

B. The Factual Record Before this Court -- The Facts as Found by The Minnesota Supreme Court

The Minnesota Supreme Court reviewed the factual record presented in this case and rejected the trial court's finding that "when the officer felt the defendant's jacket pocket, he knew immediately he was feeling a plastic bag containing a lump of crack cocaine." *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992). The Court found "the officer's 'immediate' discovery [of the crack cocaine] in this case [to be] fiction, not fact." Id. The Minnesota Supreme Court pointed out that the officer testified he was sure that he had found

crack cocaine only after first feeling a lump, manipulating it with his fingers, and sliding it within the defendant's pocket; testimony that did not support the view that the officer immediately knew what he had touched in Mr. Dickerson's pocket. The Minnesota Court further relied upon the officer's own testimony as to his intentions when he stopped Mr. Dickerson: to conduct a search -- not a protective frisk -- for weapons and drugs.

The factual finding presented to this Court by the Minnesota Supreme Court is that Officer Rose "set out to flaunt the limitations of *Terry* and he succeeded." 481 N.W.2d at 844. Thus, the factual findings presented to this Court are far different than the factual record assumed by the issue presented to this Court has been framed.

C. The Question This Court is Asked to Decide

The State of Minnesota has framed the issue presented based upon the trial court's conclusion that Officer Rose developed probable cause to believe that Mr. Dickerson possessed the contraband through his sense of touch during a lawful pat down. (Petition at i).

This question assumes a number of fact-bound findings made by the trial court but rejected by the Minnesota Supreme Court.

First, the question assumes that Officer Rose was conducting a lawful protective frisk as opposed to merely a warrantless search for contraband.

Second, the question presented assumes that Officer Rose had probable cause to believe that the item in Mr. Dickerson's

pocket was contraband as soon as he touched it.

Third, the question presented further assumes that the officer's action in manipulating the contents of Mr. Dickerson's pocket in order to determine what was in it were within the bounds of permissible action under a *Terry v. Ohio* protective frisk.

If all of these findings were supported by the factual record in this case then it would properly present the issue this Court has been asked to decide: Should there be a "plain feel" exception to the warrant requirement to permit the warrantless search of an individual based upon facts "felt" during a lawful *Terry* protective frisk. However, these are not the findings presented to this Court. The Minnesota Supreme Court found that each of these fact-bound questions should be

answered in the negative based upon its review of the record presented. The conclusions of the Minnesota Supreme Court on these fact-bound questions are entitled to deference by this Court.

This Court has long had a tradition of deference to state court findings on fact-bound questions. See, e.g., *Grayson v. Harris*, 267 U.S. 352, 357-58, (1925) (refusing to re-evaluate State Supreme Court finding that the parties to the case were citizens of the (Creek nation); *Lloyd A., Fry Roofing Company v. Wood*, 344 U.S. 157, 160 (1953) (rejecting effort to set aside State Supreme Court conclusion that the leases at issue were shams and stating: "There are no exceptional circumstances of any kind that would justify us in rejecting the Supreme Court's finding; they are not without factual foundation, and we accept them.")

Contrary to this long standing tradition of deference to fact bound findings made by state courts, the State of Minnesota urges this Court to re-evaluate the Minnesota Supreme Court's findings and conduct an "independent review of the record."

The state relies upon *Ker v. California*, 374 U.S. 23, 34 (1963) in its effort to persuade this Court to cast aside the fact-bound conclusions of the Minnesota Supreme Court. (Petitioner's Brief on the Merits, at 32).

The quotation included in the petitioner's brief is understandably incomplete. The *Ker* Court stated that it would undertake such a "independent examination of the facts, the findings and the record" in order to determine for itself whether the state court's decision as to the reasonableness of the privacy

intrusion being considered met the constitutional criteria this Court had established. The complete quotation is:

> While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental - i.e., constitutional criteria established by this Court have been respected.
>
> 374 U.S. at 34 (emphasis supplied).

The *Ker* Court made clear that this re-examination of state fact finding would be conducted only for the benefit of the citizen -- not the state -- in order to make sure that the state's determination as to the reasonableness of its agents' action did not violate the federal constitutional criteria this Court had established. Id.

Under these circumstances, the "independent examination" described in *Ker v. California* has no place. The Minnesota Supreme Court's fact-bound findings in this regard are entitled to deference by this Court.

D. Because the Issue this Court is Asked to Decide is Not Presented by the Factual Record, this Court Should Dismiss the Grant of Certiorari

It is, of course, without question that this Court has the authority to dismiss a writ of certiorari as being granted improvidently. See e.g., *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959).

As stated by Justice Frankfurter in *Armstrong v. Armstrong*, 350 U.S. 568, 572 (1956), "[a]fter a case has been heard on the merits, it is to be disposed of on the precise issue that full study of the case discloses, and not on the basis of the

preliminary examination of the questions that were urged in the petition for certiorari." Plenary consideration, in other words, may "shed more light on [a] case than in the nature of things was afforded at the time the petition for certiorari was considered." *Belcher v. Stengel*, 429 U.S. 118, 119 (1976).

Clearly one basis upon which a writ of certiorari can be dismissed as improvidently granted is that after plenary review, it is found that an important issue is not presented by the record. See e.g., *Iowa Beef Packer's, Inc., v. Thompson*, 405 U.S. 228 (1972); *McClanahan v. Morauer & Hartzel*, 404 U.S. 16 (1971). Certainly, another grounds upon which certiorari can be properly dismissed is that the question as to which certiorari was granted is not "presented with sufficient clarity in [the] case." *Kimbrough v. United States*, 364

U.S. 661 (1961). Alternatively, the record may not be "sufficiently clear and specific to permit decision of the important constitutional questions involved in the case." *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968); see also, *Johnson v. Massachusetts*, 390 U.S. 511 (1968); *Smith v. Mississippi*, 373 U.S. 238 (1963); and *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968).

Here, the issue the Court has been asked to decide is not presented by the record unless the Court is prepared to cast aside the fact-bound conclusions of the highest court of Minnesota. At the very least, the question is not presented with sufficient clarity on the facts of this case for this Court to embark upon analysis of whether another exception to the warrant requirement should become a part of this Court's fourth amendment jurisprudence.

In the event that this Court should at some point choose to embark upon this examination, it should be able to undertake it in a case without having to re-examine intensely factual questions and trample factual conclusions made by a state supreme court.

II. THE DECISION OF THE MINNESOTA SUPREME COURT SHOULD BE AFFIRMED

A. *Sibron v. New York* Controls the Disposition of this Case

Terry v. Ohio, 392 U.S. 1 (1968) is the law. *Terry* held that a law enforcement officer who has stopped an individual he suspects is involved in criminal conduct must have "narrowly drawn authority to [conduct] a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for

a crime." 392 U.S. at 27. *Terry* further made clear that the limited search it authorized was not justified by any need to prevent the disappearance or destruction of evidence of a crime. 392 U.S. at 29. Instead, the "sole" justification of the search *Terry* authorized is the protection of the police officer and others nearby and accordingly must be confined in scope "to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instruments for the assault of the police officer." 392 U.S. at 29.

The *Terry* Court affirmed Officer McFadden's action because he merely patted down the outer clothing of Terry and his companions and did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons there. Officer McFadden did not conduct a general exploratory search for whatever

evidence of criminal activity he might find. Id. at 30. Under *Terry*, an officer is therefore authorized to conduct a "carefully limited" search of the outer clothing of the individual stopped "in an attempt to discover weapons which might be used to assault him." Id. at 30.

On the same day the *Terry* opinion was issued, this Court decided *Sibron v. New York*, 392 U.S. 40 (1968). In *Sibron*, a Brooklyn patrolman named Anthony Martin conducted an eight hour surveillance of Nelson Sibron, watching him converse with six or eight persons who Martin knew from past experience to be narcotics addicts. 392 U.S. at 45. Martin observed Sibron in a restaurant late in the evening and observed him talking with three more known narcotics addicts. Sibron then sat down and ordered pie and coffee. Id. While Sibron was eating, Patrolman Martin

approached him, told him to come outside and then told Sibron "You know what I am after." Id. Sibron then "mumbled something and reached into his pocket." Id. Simultaneously, Patrolman Martin thrust his hand into Sibron's pocket and discovered a number of glassine envelopes which contained heroin. Id.

The *Sibron* Court held that Officer Martin did not have reasonable grounds to believe that Sibron was armed and dangerous and accordingly was not justified in conducting a self-protective search for weapons. Id. at 64.

More importantly, however, is Sibron's holding that even assuming that Officer Martin had an adequate grounds to search for weapons, "the nature and scope of the search conducted by Patrolman Martin were so clearly unrelated to that justification as to render the heroin inadmissible." Id.

at 65. This Court concluded that Patrolman Martin's testimony showed that he was looking for narcotics and that he found them. Accordingly, the search he conducted was not reasonably limited in scope to the accomplishment of the only goal which could have justified its inception; that is, the protection of the officer by disarming a potentially dangerous individual. Id.

In the instant case, the Minnesota Supreme Court's application of *Terry* to the facts presented here is on all fours with this Court's application of *Terry* to the facts presented in *Sibron*. Like Patrolman Martin, Officer Rose was looking for narcotics. Like Patrolman Martin, Officer Rose's examination of the tiny lump he felt in Mr. Dickerson's pocket was wholly unrelated to a search for weapons. Like Patrolman Martin's search, Officer Rose's search was "not reasonably limited in scope

to the accomplishment of the only goal which might conceivably have justified its inception -- the protection of the officer by disarming a potentially dangerous man." *Sibron*, 392 U.S. at 65. Like Patrolman Martin's search, Officer Rose's search violated the guarantee of the Fourth Amendment which protects the sanctity of the person against unreasonable intrusions by government agents. Id.

Sibron v. New York is the law. Unless this Court is prepared to overrule *Sibron* -- which NACDL amicus respectfully suggests would be a decision without justification -- the application of *Sibron v. New York* to the facts of this case requires the affirmance of the Minnesota Supreme Court's decision.

B. A Plain Feel Exception to the Warrant Requirement is an Unjustified and Unreasonable Invasion of Personal Privacy that this Court Should Not Sanction

1. A Plain Feel Exception is Not a Logical Extension of *Terry*

Petitioner contends that because police officers may properly rely upon their sense of touch to conclude that an object may be a weapon under *Terry v. Ohio*, the "logical extension of *Terry* is to permit police to conclude that other objects felt during a proper pat-search are contraband or other evidence of a crime." (Petitioner's Brief, at 19).

Terry v. Ohio is not about what physical sense an officer may rely upon to conclude that he has probable cause to conduct a search. *Terry v. Ohio* is about permitting an officer to protect himself during an investigatory stop by conducting a carefully limited search of the outer clothing of the individual he has stopped.

This Court, in *Terry*, recognized that the limited search it was authorizing was a "severe, though brief, intrusion upon cherished, personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." 392 U.S. at 25. The *Terry* Court found that the "sole justification" for the carefully drawn authority it gave police officers was the imperative need to protect the officer and those in the area. Id. at 31.

This Court made clear in *Sibron v. New York* that once the need to protect the officer was removed, any intrusion upon the personal privacy of an individual thereafter was constitutionally unreasonable. *Sibron v. New York*, 392 U.S. 64, 65 (1968). Accordingly, *Terry* is far from a building block for the position the petitioner urges this Court to adopt. *Terry* is a significant stumbling block for

the petitioner to overcome in its effort to persuade this Court to adopt yet another exception to the warrant requirement of the Fourth Amendment to the United States Constitution.

2. Feeling is More Invasive than Seeing or Smelling: The "Plain Feel" Doctrine is not a Mere Corollary to the Plain View Doctrine

That feeling or touching is a more significant invasion of personal privacy than mere observation with either eyes or nostrils should be without question. If a stranger observes us walking down the street, we think nothing of it. If a stranger smells our cologne or perfume and comments, we are either complimented or our suspicions concerning their intentions are raised. But, if a stranger feels our pockets in order to determine what is in them, we are, at a minimum, significantly offended. Depending upon the proximity of

the pocket to our intimate body parts, we may even contact a law enforcement officer to report a crime.

It is against this back drop of our societal sensibilities that *Terry v. Ohio* was written. The limited feeling of outer clothing was found justified, as discussed above, only if facts were present to lead a reasonable police officer to believe that the individual suspect was armed and dangerous to the officer and to the community as a whole. The need to search for and preserve evidence was held in *Terry* not to be a sufficient justification to permit the feeling of a person's body without the judicial authorization of a warrant or facts sufficient to establish probable cause to place that individual under arrest. *Terry*, 392 U.S. at 29.

Another reason that the plain feel exception advocated here is far more than a

mere corollary to the plain view doctrine is that to "recognize" an object through the tactile sense is in itself a search requiring probable cause. The detection of evidence by sight or smell can, of course, be accomplished without the physical intrusion of one's person; however, this is not so with respect to evidence discovered by touch. Evidence seen or smelled before any physical intrusion may be relied upon to establish probable cause to arrest and search an individual. In sharp contrast, one cannot search first to gather evidence to establish probable cause needed to justify the initial intrusion were the law otherwise, the requirement of probable cause would be turned on its head. See generally, *Smith v. Ohio*, 494 U.S. 541 (1990). See also, *State v. Broadnax*, 654 96, 102 (Wash. 1982) (en banc).

On the record before this Court there can be little question that Officer Rose conducted a search of Mr. Dickerson's pocket to "recognize" the object that he concluded was crack cocaine. During Officer Rose's pat-down of Mr. Dickerson, he "felt a lump, a small lump in the front pocket of the very fine nylon jacket." (T. 19). Officer Rose made no claim that he believed this lump to be a weapon.

Under *Terry*, his ability to further probe the item was circumscribed.

Contrary to the contention of the United States' amicus brief, the examination of the item by Officer Rose with his fingers through the jacket pocket was far more than a "momentary manipulation." Officer Rose testified that he examined it to the extent that he was able to determine that it "slid", that it was in like a "sandwich wrapped material

with a knot tied on it. You could feel the knot through the nylon also." (T. 19). It defies logic to contend that the detail with which Officer Rose described this item in Mr. Dickerson's pocket **before** he removed it, could be obtained by a manipulation of that object that was "merely a continuation of a lawful protective search for weapons." (Brief for United States as Amicus Curiae, at 13). The manipulation of the item in Mr. Dickerson's pocket which Officer Rose knew not to be a weapon is precisely the action *Terry* held was impermissible.

Officer Rose's action is constitutionally indistinguishable from Officer Nelson's action at issue in *Arizona*

v. Hicks, 481 U.S. 321 (1987).[1] In *Arizona v. Hicks*, Officer Nelson was lawfully in the petitioner's apartment. While there, he saw stereo equipment that seemed out of place. He suspected that the equipment was stolen and moved some of the components to read and record their serial numbers. Using this information, he learned that some of this equipment had been taken in an armed robbery and Hicks was subsequently indicted for the robbery.

This Court held that Officer Nelson's moving of the equipment constituted a search separate and apart from the search that was the lawful objective of Officer Nelson's entry into the apartment. 480

[1] Not surprisingly, the United States as Amicus Curiae goes to great lengths to distinguish Officer Rose's action from the conduct this Court found to violate the Fourth Amendment in *Arizona v. Hicks*, 481 U.S. 321 (1987). For the reasons that will be discussed, *Hicks* is indistinguishable.

U.S. at 324-325. This Court held that merely inspecting the parts of the turn table that were in view during the lawful search would not have constituted an independent search; but, that taking action "unrelated to the objectives of the authorized intrusion" which exposed to view the concealed portions of the apartment or its contents produced a new invasion of Hicks' privacy that was unjustified by the exigent circumstances that justified the officer's entry. Id.

The Court then concluded that this "search" was constitutionally unjustified because Officer Nelson lacked probable cause to believe that the stereo equipment was stolen. 480 U.S. at 328.

In this case, Officer Rose's action in manipulating the object he knew immediately not to be a weapon was wholly unrelated to the objectives of the authorized intrusion

of Mr. Dickerson's personal privacy: the pat-down search for weapons. As in *Hicks*, although Officer Rose had a lawful right to touch Mr. Dickerson's pocket, he conducted a separate and independent search through his detailed examination of the item therein through the jacket material. His search of the pocket to bring this item into so called "plain view" was unlawful because it was not based upon probable cause. *Arizona v. Hicks*, 480 U.S. at 328-329.

3. The Plain "Feel" Exception is Wholly Unrelated to any Officer Safety Issue

Those who would advocate the adoption of the "plain feel" exception urge this Court to adopt a rule permitting the police to have the authority to remove items from an individual that the police know not to be a weapon. (See Brief of Amicus Curiae for Americans for Effective Law

Enforcement, Inc., at 8). The police officers of this nation are already authorized under *Terry v. Ohio* to conduct a pat-down search reasonably designed to discover and remove anything that might be a weapon. In this context, *Terry v. Ohio* gives the police officers of our nation all the protection necessary.

Illustrative of this point is a study conducted in 1972 showing that of the 112 police officers tragically killed in the line of duty that year, 108 of them were killed with firearms and two were killed with knives. Uniform Crime Reports for 1972 prepared by the Federal Bureau of Investigation (cited in *United States v. Robinson*, 414 U.S. 218, 234 n. 5 (majority opinion) and 255 n. 5 (1973) (Marshall, J. dissenting). Accordingly, in that year, virtually all of the officers murdered in the line of duty were killed with guns and

knives, precisely the type of weapons that will not go undetected in a properly conducted weapons frisk. See *Robinson*, 414 U.S. at 255 (Marshall, J. dissenting).

No party has cited to this Court more recent studies showing that there is in existence any new weapon available to the citizenry at large that cannot be detected by an officer through a properly conducted weapons frisk. There is also no further explanation why a rule that does not permit law enforcement officers to reach into a suspect's pocket, to remove something that the officer knows not to be a weapon but believes to be contraband or evidence of a crime, will cause those officers to **"hesitate under circumstances that could cost them their lives."** (Brief Amicus Curiae of Americans for Effective Law Enforcement, Inc., at 8 (emphasis in original)).

The membership of NACDL is likewise concerned about the safety of our nation's policeman, many of whom we work with regularly and call our friends. NACDL respectfully urges this Court, however, not to be taken in by the emotional claim that the rule the respondent in this case urges this Court to adopt will make it safer for the officer on the street when that rule is simply and wholly unrelated to the officer's ability to protect themselves while doing their job.

For all of these reasons, the "plain feel" exception to the warrant requirement is without justification sufficient to permit the warrantless pinching, squeezing, and probing of the contents of our citizen's pockets in an effort to ferret out contraband or evidence of a crime. The fourth amendment does not now permit such

action and this Court should not hold that it does.

C. If this Court Adopts a "Plain Feel" Exception to the Warrant Requirement of the Fourth Amendment, this Exception Should Have Limits and These Limitations Preclude its Application Here

For the reasons discussed previously, NACDL Amicus Curiae strongly urge this Court not to craft yet another exception to the warrant requirement of the Fourth Amendment to the United States Constitution. Such an exception constitutes a severe invasion of personal privacy that is not justified by either societal needs or the protection of officers in the line of duty.

Nonetheless, if this Court is inclined to add this exception to its fourth amendment jurisprudence, NACDL Amicus Curiae respectfully urges this Court to insure that such an exception is properly

limited in order to ensure that the "plain feel" exception remains grounded in its purported logical corollary -- the plain view doctrine.

First, inquiry should be made to determine whether the real aim of the search in question was the discovery or preservation of contraband rather than the immobilization of weapons. If so, the intrusion is not authorized by *Terry v. Ohio*. See *United States v. Williams*, 822 F.2d 1174, 1179 (D.C. Cir. 1987). Therefore, any "plain feel" exception would only apply where an officer is legally authorized to touch the individual's outer clothing in the first place. Id. at 1184.

Second, the requirement in traditional plain view situations that an officer have a "lawful vantage point" requires a parallel limitation upon the plain feel doctrine: "The doctrine would not sanction

any use of the sense of touch beyond that justified by the initial contact with the container or clothing." Id. Accordingly, once an officer has satisfied himself that no weapon is present in the clothing, he is not free to continue to manipulate it in an attempt to discern contents of the person's clothing. Id.

Finally, the invasion of an individual's clothing to recover something an officer believes to be contraband or other evidence of a crime should only be justified when the lawful touching of that outer clothing convinces the officer to a "reasonable certainty" that the clothing does indeed hold contraband or evidence of a crime. Id. The information in "plain view" as a result of the touching must be good enough to eliminate all need for additional search activity and can occur only when the sensory information acquired

by the officer "rises to a state of certitude, rather than mere prediction, in regard to the object of investigation." *Williams*, 822 F.2d at 1185.

The *Williams'* court addressed the application of a plain feel exception to the warrant requirement authorizing the opening of a container whose contents had become known through lawful touching of its outside. The prerequisites established by *Williams* that must be met before a container can lawfully be opened are even more clearly needed when the sanctity of an individual's own clothing is to be invaded based upon that which an officer feels from his touch of that clothing.

When these limitations are applied in the instant case, it becomes clear that a plain feel exception cannot be relied upon to justify the admission of the items seized from Mr. Dickerson.

Officer Rose knew clearly that the item in Mr. Dickerson's pocket was not a weapon but continued to manipulate the item in an attempt to ascertain its identity. *Williams*, 882 F.2d at 1184. Further, the lawful touching of the item in Mr. Dickerson's pocket must have given Officer Rose a "reasonable certainty" that the item he felt was contraband or evidence of a crime. The information available to Officer Rose by his lawful touch must be good enough to eliminate all need for further search activity. However, Officer Rose did not have that type of information from his lawful touching. Instead, he manipulated the item in the pocket significantly which was not lawful and accordingly cannot be relied upon in this case to provide him with the reasonable certainty that the item in Mr. Dickerson's

pocket was crack cocaine. *Williams*, 822 F.2d at 1185.

Accordingly, a properly limited "plain feel" exception of the warrant requirement, if adopted by this Court, would not justify Officer Rose's decision to reach into Mr. Dickerson's pocket to retrieve the item therein.

CONCLUSION

This case does not present the question this Court is asked to answer. Officer Rose did not develop probable cause to believe that Mr. Dickerson had contraband in his pocket based upon his lawful examination of Mr. Dickerson's outer clothing.

Officer Rose set out to accomplish a warrantless search of Mr. Dickerson for contraband and did just that. If this Court is inclined to resolve the question whether a warrant requirement of the Fourth

Amendment of the United States Constitution contains an exception for things plainly felt as it does for things plainly viewed, it should do so in a case where a law enforcement officer did plainly feel something obviously contraband during the course of his lawful conduct. This Court should dismiss the grant of the writ of certiorari.

Terry v. Ohio is the law. The limited authorization it gives our nation's officers to conduct protective pat-down searches is fully justified by the need to protect officers and other citizens. This severe intrusion into personal privacy is not and should not be held to be justified by anything short of the need to protect officers in their line of duty. The "plain feel" exception to the warrant requirement advocated in this case is not the next logical step from *Terry* and this Court's

jurisprudence -- it is an unnecessary and unjustified step that will erode the integrity of the protection the Fourth Amendment provides all citizens.

For all these reasons, NACDL as amicus curiae respectfully requests this Court to dismiss the writ of certiorari in this case or alternatively, to affirm the judgment of the Minnesota Supreme Court.

Respectfully submitted,

DAVID M. ELDRIDGE
RITCHIE, FELS & DILLARD, P.C.
Post Office Box 1126
606 West Main Street
Knoxville, Tennessee 37901-1126
(615) 637-0661

Attorney for Amicus Curiae
National Association of
Criminal Defense Lawyers